Borneo Samudera Sdn Bhd v Siti Rahfizah bt Mihaldin & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO S-02–935 OF 2007
GOPAL SRI RAM, TENGKU BAHARUDIN SHAH AND SULAIMAN DAUD JJCA
25 FEBRUARY 2008

Arbitration — Stay of proceedings — Application — Whether matter to be referred to arbitration — Whether agreement to arbitrate ousted jurisdiction of ordinary courts — Whether agreement illegal and void — Whether opposition to stay fell within s 10(1)(a) or (b) of the Arbitration Act 2005

Civil Procedure — Action — Multiplicity of actions — Application for stay containing primary relief and alternative relief — Whether amounted to multiplicity of actions

The appellant and the third to 821st respondents were parties to a joint venture agreement which contained an arbitration agreement. Among the terms of the agreement was, inter alia, that disputes, difference or question shall be settled by arbitration in accordance with the provisions of the Arbitration Act. Subsequently, the first and second respondents commenced an action in the High Court against the appellants and another defendant. The appellant applied to stay the action, relying on s 10(1) of the Arbitration Act 2005 ('the AA'). However, the application was dismissed on the grounds that the arbitration agreement was null and void as it ousted the jurisdiction of the court and that there would be a multiplicity of actions. Hence this appeal by the appellant. In opposing the appeal, the respondents contended that in a previous application, the appellant sought an order for stay and in the alternative to transfer the suit to the High Court in Tawau. The respondent also submitted that in the current application, apart from asking for stay, the appellant had also moved the court for an alternative order for security for costs, which amounted to submitting to the jurisdiction of the court and therefore not entitled to stay.

Held, allowing the appeal with costs:

(1) There was no merit in the respondent's argument that this was a case where the doctrine of issue estoppel would apply as the judge in the previous application had already transferred the suit to Tawau and had disallowed the other prayers. However the appellant was allowed the liberty to file afresh (see para 6).

(2) The primary application of the appellant was to stay the action. The alternative prayer was made in the event that the primary relief sought was not allowed. This neither amounted to a step in the proceedings nor did it constitute submission to jurisdiction. It may have been otherwise if the appellant had made a separate application for security for costs and then later moved the court for a stay (see para 8).

(3) In the circumstances, the arbitration agreement was not void. This was clearly seen in the exceptions 1 and 2 to s 29 of the Contracts Act 1950 which formed part of the ratio in *Scott v Avery* (1856) 10 ER 1121, namely, that an agreement to arbitrate did not oust the jurisdiction of the ordinary courts and was therefore not illegal and void. Further, the opposition to the stay did not fall within s 10(1)(a) or (b) of the AA (see para 9).

[Bahasa Malaysia summary

Perayu dan responden-responden ketiga hingga ke-821 adalah adalah ahli kepada satu perjanjian usaha sama yang mengandungi perjanjian timbangtara. Di antara terma-terma perjanjian tersebut adalah, antara lain, bahawa pertikaian, perbezaan atau pertanyaan harus diselesaikan oleh timbangtara mengikut peruntukan-peruntukan Akta Timbangtara. Seterusnya, responden-responden pertama dan kedua memulakan tindakan di Mahkamah Tinggi terhadap perayu-perayu dan seorang lagi defendan. Perayu memohon untuk penggantungan tindakan, dengan bergantung kepada s 10 Akta Timbangtara 2005 ('AT'). Walau bagaimanapun, permohonan tersebut telah ditolak berdasarkan bahawa perjanjian timbangtara tersebut adalah batal dan tidak sah kerana ia mengenepikan bidang kuasa mahkamah dan akan terdapat tindakan yang bertindih. Maka rayuan ini oleh perayu. Dalam membantah rayuan ini, responden-responden menegaskan bahawa dalam permohonan sebelum ini, perayu memohon untuk satu perintah penggantungan dan sebagai alternatif untuk memindahkan guaman tersebut ke Mahkamah Tinggi di Tawau. Responden juga berhujah bahawa dalam permohonan sekarang, selain dari meminta penggantungan, perayu juga telah memohon kepada mahkamah untuk satu perintah alternatif bagi sekuriti untuk kos, yang membentuk penyerahan kepada bidang kuasa mahkamah dan oleh itu tidak berhak kepada penggantungan.

Diputuskan, membenarkan rayuan dengan kos:

(1) Tidak terdapat merit dalam hujahan responden bahawa kes ini adalah yang mana doktrin isu estopel akan digunapakai kerana hakim dalam permohonan sebelum ini telah memindahkan guaman ke Tawau dan telah menolak tuntutan-tuntutan lain. Walau bagaimanapun, perayu telah dibenarkan kebebasan untuk memfail semula (lihat perenggan 6).

(2) Permohonan utama perayu adalah untuk menggantung tindakan tersebut. Tuntutan alternatif dibuat sekiranya relief utama yang dipohon tidak dibenarkan. Ini tidak bermaksud langkah dalam prosiding-prosiding dan juga tidak membentuk menyerah kepada bidang kuasa. Ia mungkin akan menjadi sebaliknya jika perayu telah membuat permohonan berasingan untuk jaminan sekuriti kepada kos dan kemudiannya memohon kepada mahkamah untuk penggantungan (lihat perenggan 8).

(3) Dalam hal ini, perjanjian timbangtara tidak terbatal. Ini dilihat jelas dalam pengecualian-pengecualian 1 dan 2 s 29 Akta Kontrak 1950 yang membentuk sebahagian daripada ratio dalam kes *Scott v Avery* (1856) 10 ER 1121, iaitu, satu perjanjian untuk timbangtara tidak mengenepikan bidang kuasa mahkamah-mahkamah biasa dan oleh itu tidak menyalahi undang-undang dan terbatal. Seterusnya, bantahan kepada penggantungan tidak terangkum dalam s 10(1)(a) atau (b) AT (lihat perenggan 9).]

Notes

For cases on application, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1488–1527.

For cases on multiplicity of actions, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 151–152.

Cases referred to

Sabil Mulia (M) Sdn Bhd v Pengarah Hospital Tengku Ampuan Rahimah & Ors [2005] 2 CLJ 122 (refd)

Scott v Avery (1856) 10 ER 1121 (not folld)

Legislation referred to

Arbitration Act 2005 s 10(1), 10(1)(a), 10(1)(b)
Contracts Act 1950 s 29, Exceptions 1, 2
Rules of the Court of Appeal 1994

Appeal from: Suit No T(22)–41 of 2007 (High Court, Tawau)

Ho Kin Kong (Mohd Azahari bin Matiasin with him) (Ho Chong Yong) for the appellant.

Marina Tiu (CJ Liew & Co) for the respondent.

Gopal Sri Ram JCA (delivering judgment of the court):

[1] This is the judgment of the court.

[2] This appeal is directed against the order of the High Court of Tawau dated 9 August 2007 dismissing the appellant's (second defendant's) application to stay Suit No T(22)–41 of 2007 before that court and to have the dispute referred to arbitration. The brief facts of the case are as follows.

[3] The appellant and the third to 821st respondents are parties to a joint venture agreement dated 9 July 1998 which contains an arbitration agreement in the following terms:

> In the event that any of such dispute, difference or question which may arise under, or out of, in connection with or in relation to this Agreement cannot be resolved amicably then such disputes, difference or question shall be settled by arbitration and in accordance with the provisions of the Arbitration Act or any statutory modification or re-enactment thereof for the time being in force. Any such arbitration shall be conducted in the English language, at Kota Kinabalu, Malaysia or at another location mutually nominated by the Parties hereto. The Party in whose favour the arbitration award is granted shall be entitled to recover costs and expenses of administration of the arbitration proceedings. Any arbitration award granted shall be final and binding on the Parties and is not subject to appeal and shall be enforceable by any Court of competent jurisdiction.

[4] By a writ dated 31 March 2006, the first and second respondents commenced an action in the High Court against the instant appellant and another defendant. By a summons in chambers dated 1 June 2007 the appellant applied to stay the action. It relied on s 10(1) of the Arbitration Act 2005 which is in the following terms:

> (1) A court before which proceedings are brought in respect of a matter which is the subject of an arbitration agreement shall, where a party makes an application before taking any other steps in proceedings, stay those proceedings and refer the parties to arbitration unless it finds —
>
> (a) that the agreement is null and void, inoperative or incapable of being performed; or
>
> (b) that there is in fact no dispute between the parties with regard to the matters to be referred.

[5] The learned judge in the High Court dismissed the summons on the following two grounds:

(i) the arbitration agreement is null and void because it ousts the jurisdiction of the court; and

(ii) because there would be a multiplicity of actions and the same issues would be ventilated in the arbitration proceedings as well as the court.

[6] Before us, counsel for the respondents, Marina Tiu, in supporting the learned judge's decision has argued that the appeal should be dismissed because the appellant had taken a step in the proceedings, thereby depriving it of its right to seek a stay. She has drawn our attention to a previous application made by the appellant dated 26 May 2006. In that application, the appellant sought an order for stay and in the alternative to transfer the suit to the High Court in Tawau, Sabah. We have perused the order made on that application and find that the learned judge did transfer the suit to Tawau and disallowed the other prayers but granted the appellant liberty to file afresh. We accordingly find no merit in the argument of the respondents' counsel that this is a case where the doctrine of issue estoppel would apply. In our judgment no issue was determined by the High Court hearing at 28 March 2007. All that happened was that the suit was transferred to Tawau and the appellant's right to make a fresh application for stay preserved.

[7] Learned counsel for the respondents takes a further point. She argues that in the present summons, that is, in the application that forms the subject matter of this appeal, the appellant apart from asking for stay also moved the court for an alternative order for security for costs, which she said is a step in the proceedings. She submits that by asking for security for costs the appellant has submitted to the jurisdiction of the court and is therefore not entitled to the stay.

[8] With respect, we reject this argument. The primary application of the appellant was to stay the action. The alternative prayer was made in the event that the High Court was not with the appellant in the primary relief it sought. This in our judgment, neither amounts to a step in the proceedings nor does it constitute submission to jurisdiction. It may have been otherwise if the appellant had made a separate application for security for costs and then later moved the court for a stay.

[9] To summarise, we are not in agreement with the learned judge that the arbitration agreement is void. Exceptions 1 and 2 to s 29 of the Contracts Act 1950 make that absolutely clear. These exceptions house the ratio in *Scott v Avery* (1856) 10 ER 1121, namely that an agreement to arbitrate does not oust the jurisdiction of the ordinary courts and is therefore not illegal and

void. Were it otherwise, no arbitration clause would ever survive. We may add that we are also satisfied, having regard to the facts of this case, the opposition to the stay does not fall within s 10(1)(a) or (b) of the Arbitration Act 2005.

[10] For the reasons already given, this appeal is allowed. The orders of the learned judge are hereby set aside. There shall be an order in terms of prayer (a) of the appellant's summons dated 1 June 2007. The action is hereby stayed. The respondents must bear the costs here and below. The deposit in court shall be refunded to the appellant.

[11] One final point. This morning we were moved for a stay of proceedings before the High Court in Tawau. Since all the relevant materials are before us, with the consent of counsel, we ordered that the motion be treated as the appeal proper and dispensed with compliance of the Rules of the Court of Appeal 1994. We have ample jurisdiction to do this. See *Sabil Mulia (M) Sdn Bhd v Pengarah Hospital Tengku Ampuan Rahimah & Ors* [2005] 3 MLJ 325.

Appeal allowed with costs.

Reported by Munira Mahmud